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Supreme Court, U.S.
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No: 95-65 JUL 14 1995

In The Supreme Court of the United States

October Term 1995

JAMES L. HOOPER, M.D., et al.,
Petitioners,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William A. Beeton, Jr.
Counsel of Record for Petitioners
Allen H. Sachsel
Of Counsel for Petitioners
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400

LIBERTY LEGAL SERVICES
1111 East Main Street ♦ Richmond, VA 23219 ♦ (804) 643-6054

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QUESTIONS PRESENTED

1. Whether a plaintiff in an Age Discrimination in Employment case who has adduced as evidence a statement of age animus specifically referring to him and related to adverse employment actions against him should survive a motion for summary judgment, especially when he also has shown other age related statements referring to him, and disparate treatment.

2. Whether the court of appeals misinterpreted or misapplied the abuse of discretion standard of review in an appeal from a district court's imposition of FRCP Rule 11 sanctions of:

> (a) $5000 for signing the Second Amended Complaint and the Opposition to the Motion for Summary Judgment in this case on grounds plaintiff 's filings did not meet FRCP Rule 11 standards, and based in substantial part on the district court's "abiding conviction", unsupported by any evidence, that the case was pursued with the intent to cost the defendants as much as possible to defend; and
>
> (b) $500 for signing a motion, pursuant to FRCP Rule 54(b) and based on 28 U.S.C. 1367(c), to partially vacate the summary judgment, before entry of final judgment, on grounds the district court may improvidently have ruled on a novel issue of Maryland law after deciding to dismiss the related federal claims, especially when a Maryland state case between the same parties in which such issue could have been litigated was pending.

PARTIES

Petitioner is James L. Hooper, M.D., for Question No. 1. Allen H. Sachsel is petitioner for Question No. 2. The first named Respondent is Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A., which was known as Montgomery Medical Group, P.A., at the time this case was filed in the district court. That former name, though the name change took place in April, 1993, has been used in the style of this case through the court of appeals. Other Respondents are Susan J. Withrow, M.D., Charles Karesh, M.D., Pasqual Perrino, M.D., Steven Dolinsky, M.D., Herbert Juarbe, M.D., and Carolyn Baier, M.D. Paul R. Wiesenfeld and John H. Conrad are listed in the court of appeals opinion and order denying the petition for rehearing as "Parties in Interest." They appeared in the district court to object to certain discovery sought from them. Neither has an interest in this case, and they are not parties to this Petition.

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Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

OPINIONS BELOW

The unreported opinion of the court of appeals is reproduced at A.1-10.[1] The unreported opinion of the district court granting summary judgment is reproduced at A.32-54. The unreported opinions of the district court relating to FRCP Rule 11 sanctions are reproduced at A.61-70 and 74-76. The unreported opinions of the district court (magistrate judge) with respect to discovery are reproduced at A.19-31. The unreported opinion of the district court denying respondents' motion to disqualify trial counsel is reproduced at A.11-18.

JURISDICTION

The judgment of the court of appeals was entered March 3, 1995. A timely filed petition for rehearing was denied by a 2 to 1 vote on April 17, 1995 (A.78-81). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

29 U.S.C.623(a)(1), 28 U.S.C. 1367(a), FRCP Rule 11 (both pre and post December 1, 1993),[2] and FRCP Rule 54(b) are reproduced in relevant parts at A.197-202.

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1 "A." references are to a separately bound Appendix.

2 Sanctions were imposed by Orders dated November 29, 1993, and December 20, 1993. The revision of Rule 11 is immaterial to this case.

STATEMENT

A. Facts

In 1964, petitioner James L. Hooper, M.D., founded a medical practice in Gaithersburg, Maryland.[3] Except for a brief period in May, 1989 (*see, infra*), Dr. Hooper was President of MMG from its inception until September, 1990. He was at all times relevant over 40 years old, was the oldest MMG "partner", and was nearing 60 when this case arose.

While the form of the practice was a professional corporation, in fact, it was operated much like a partnership. Thus, the number of shares purchased by physicians hired by Dr. Hooper directly related to their scheduled hours of work--those working full-time owning 50 shares each, and those working 3/4 time owning 37½ shares each. A physician who became a partner automatically was elected to the Board of Directors, and regardless of the number of shares owned, had an equal voice in management. When this case arose, there were, in addition to Dr. Hooper, six shareholders/ "partners"/directors of MMG, all younger than Dr. Hooper, and all of whom were brought into the practice by Dr. Hooper.

In 1989, MMG desperately needed a loan for a tax liability. The other partners believed only Dr. Hooper could obtain the loan which also was critical to them personally. Dr. Hooper, who in May, 1989, resigned as President over an unrelated disagreement, also at that time struck out his signature on loan papers. After MMG and the other partners were unsuccessful in getting the loan, five of them asked Dr. Hooper to return as President, primarily because of his perceived ability to secure the loan, which required personal guarantees, including the pledge of Dr. Hooper's home, the

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[3] At all relevant times the practice was a professional corporation. When this case arose, the corporation was named Montgomery Medical Group, P.A. In April, 1993, the name was changed to that in the caption. The corporation is referred to as "MMG."

single most valuable piece of non-corporate collateral. Dr. Hooper agreed to return based on promises of the five that he would remain President until the loan, if obtained, was satisfied (A.138).

Dr. Hooper, after returning as President based on the above-mentioned promises, was thereafter again reelected President in the late Summer or early Fall of 1989. The loan[4] was finalized in early 1990 with Dr. Hooper's home pledged as collateral.

In September, 1990, at the very first election of officers after the loan was obtained, Dr. Hooper suddenly was voted out as President. Respondent Susan Withrow was elected.[5]

Just after the September, 1990 election meeting, respondent Dolinsky, who nominated Withrow, received a phone call in the office. According to Tina Rankin, Dolinsky's secretary, Dolinsky stated to the caller:

> [W]e voted Dr. Hooper's old ass out as President and now we have younger blood running through the corporation. . . It is just a matter of time until we get his old ass out completely.

Dolinsky then told Ms. Rankin to "just act like you did not hear the phone conversation."

Almost immediately after Withrow's election and Dolinsky's above-quoted statement, MMG and the individual respondents began to harass Dr. Hooper. They demanded he vacate the office he had occupied for years. Then, he was ordered not to work in the main office, but instead to work at a satellite office 20 miles away. He was subjected to verbal abuse and generally was treated in a demeaning fashion, was

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[4] The loan is at times hereafter referred to as the "IRS loan."

[5] Dr. Hooper initially did not vote for Withrow. When the matter of her election was a *fait accompli*, Dr. Hooper stated he would "go along" with it. (A.139).

denied keys to the office, and was excluded from what were, in effect, directors' meetings held secretly among the other six partners. Dr. Hooper was treated as less than a full partner. Criticism was leveled at him at every turn, and any perceived problems were handled in condescending and sarcastic ways. MMG and the individual respondents stated they believed his conduct was damaging the corporation (A.140). (In their explanation for discharging him, respondents gave as part of their reason that Dr. Hooper had engaged in questionable financial dealings in the mid-1980's. Respondents were unable to prove any wrongdoing. The matter was dropped, and Dr. Hooper repeatedly was re-elected President by the individual respondents.) By contrast, as alleged in the Complaint, other partner physicians were not treated in like manner. In fact, one of the other partners, who had taken sexual liberties in the office with a female patient, gone to her apartment, overdosed her with drugs, and sodomized her, had no action taken against him. Dr. Hooper had wished to terminate him, but the others refused, one of them stating (to excuse the behavior) that the offending partner was "a young and unmarried man" (A.140). This improper behavior occurred in the mid-1980's (at approximately the same time as Dr. Hooper's claimed and unproven improper financial dealings) and was admitted by the "young and unmarried" physician. It resulted in legal claims against the physician and MMG (A.140).

Understandably, Dr. Hooper reacted to this harassing and disparate treatment, responding both calmly and emotionally. Finally, in early 1991, after respondent Dolinsky told Dr. Hooper he was "getting close to retirement age" and asked what it would take to get him to leave, Dr. Hooper had no remaining doubts of the others' intentions. (Dolinsky confirmed in deposition the desired departure, stating he considered offering Dr. Hooper an "emeritus" position.) Dr. Hooper was prepared to leave if MMG bought his stock at fair value. In April, 1991, he reached an oral agreement with Withrow, who, as part of her duties as President, was to deal with "Dr. Hooper problems", that he would take a leave of

absence while an agreement was negotiated for purchase of his stock. On April 18, 1991, this agreement was reduced to writing and signed by both Drs. Hooper and Withrow.[6] Withrow testified:

> All of the partners were aware and given copies of this note [the April 18 memorandum]. Dr. Hooper took a unilateral action and chose to take a leave of absence which all of us chose to accept.

Thereafter, MMG circulated memoranda confirming Dr. Hooper's leave of absence. Additionally, respondent Perrino, who had become MMG President, testified that Dr. Hooper was on a leave of absence from which he might return.

Negotiations stalled. Respondents evidenced a total lack of good faith. As part of any buy-out, they demanded a general release from Dr. Hooper and that they give Dr. Hooper no release. They made no offer for the stock.[7]

With the negotiations placed in this posture by MMG's bad faith, MMG decided to end Dr. Hooper's employment. A meeting for that purpose was called for July 31, 1991. Notwithstanding Dr. Hooper's request that the meeting be scheduled at a time when he could attend (A.141-142), the

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[6] The handwritten agreement reads (emphasis in original):

> TO: Dr. Susan Withrow
> FROM: Dr. J. Hooper
> DATE: 4/18/91
>
> Per our conversation of 4/12/91 I will be on leave effective 4/29/91 while accounts & attorneys & the board of directors work out an acceptable buy out of my stock. This is *not* a resignation!

[7] Counsel for MMG was directed by the Board to draft a buy/sell agreement applicable to *all* partners, including Dr. Hooper who at that time was a member of the Board. We were precluded from inquiring into to these consultations on grounds of attorney/client privilege (A.20-25).

MMG Board met July 31, 1991, did not re-elect Dr. Hooper a director, and voted to terminate him. He was notified by letter of August 20, 1991, that he was discharged effective October 19, 1991.[8]

In September, 1991, Dr. Hooper filed his Age Discrimination Charge. Thereafter, and prior to his official termination date, he requested lists of his Panels of patients[9] so he could, if he wished, enter private practice and notify such patients of his availability. MMG did not respond. It also failed, after knowledge of the Charge, to make loan payments it had promised to pay on Dr. Hooper's malpractice insurance premiums, failed to pay Dr. Hooper's last 60 days pay, banned him totally from the premises while he still was an employee, notified the HMO's and hospitals he was no longer affiliated with MMG while he still was employed, and refused to account to him for a computer billing partnership. Dr. Hooper amended his Charge to allege Retaliation. *See*, A. 142-143.

B. Proceedings Below[10]

This action, with jurisdiction based on 29 U.S.C. 626(c) and (d), 28 U.S.C. 1331, 1391(b) and (c), and 1367(c),[11] was filed in January, 1992. The Complaint[12] alleged

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[8] Dr. Hooper's employment contract provided that either party could terminate the agreement without cause on 60 days notice. The other corporate principals had identical contracts.

[9] A physician's Panels are members of an HMO or similar organization who have selected that physician as his or her primary care doctor.

[10] In this section, because of the sanctions issues, we also discuss the district court's rulings and procedures on matters other than Age Discrimination.

[11] The Complaint (*see*, n.12, *infra*) did not specifically rely on 28 U.S.C. 1367(c) for the non-federal claims. It pled them as pendent to the federal Age and Retaliation Counts.

[12] "Complaint", unless otherwise stated, refers to the Second Amended Complaint (A.82-100). The original complaint alleged Age Discrimination in Employment and breach of the April, 1991 leave of

Age Discrimination in Employment, Retaliation, breach of the April, 1991 leave of absence agreement, breach of contract with regard to the five individual respondents' promises to retain Dr. Hooper as President until satisfaction of the IRS loan, fraud in obtaining Dr. Hooper's signature on the loan and the pledge of his home, breaches of fiduciary duties owed in a closely held corporation, conspiracy, and ERISA violations. A jury was demanded.

The magistrate judge[13] denied discovery into malpractice and professional misconduct of younger physicians employed by MMG, notwithstanding that the Complaint specifically alleged (A.84):

> ...plaintiff had not had malpractice and other professionally related problems certain other of the individual defendants had had. All such other younger physicians were retained despite such problems, whereas plaintiff was discharged.

Discovery regarding consultations with corporate counsel about the buy/sell agreement also was denied (A.84).

The district court granted summary judgment on Counts I through VII of the Complaint. The ERISA claim in Count VIII was dismissed as moot because MMG had made the sought payments.[14]

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absence agreement; an amended complaint added the Retaliation Count. The Second Amended Complaint added the additional causes of action. Counts I and II are against all respondents. Counts III and VIII are against MMG, only. Counts VI and VII are against all the individual respondents. Counts IV and V are against all individual respondents except Withrow.

[13] The district judge referred the case to a magistrate judge for resolutions of discovery disputes (*see*, A.19).

[14] The ERISA Count was mooted when MMG provided the relief sought. The district court awarded Dr. Hooper $500 of the $5,500 in counsel fees he expended to obtain MMG's compliance. Though the action resulted in payments in five figures to Dr. Hooper and others, the

With respect to Age Discrimination, the court held Dolinsky's statement that they voted Dr. Hooper's "old ass out as President", that they now had "younger blood running through the corporation", and that it was not "just a matter of time" until they would "get his old ass completely", and his apparent knowledge of the significance of his statement by telling his secretary to forget what she had heard, irrelevant because it was "isolated [and] made over the phone to an unknown party" and was "isolated and ambiguous [and] too abstract and prejudicial." "This comment", the court said, "simply does not indicate, in context, that Dr. Dolinsky's concern was with Dr. Hooper's age rather than Dr. Hooper's management style, a style Dr. Hooper concedes was abusive" (A.39-40). The court then dismissed Dolinsky's asking what it would take to get Dr. Hooper to leave because he was "getting close to retirement age", and Dolinsky's "emeritus" status testimony as not indicating Dr. Hooper's age was a factor in his termination, stating, "These comments *more likely* demonstrate that Dr. Dolinsky recognized the problems Dr. Hooper's abusive behavior created in the office and wished to find a workable solution to the problem short of termination"(A.40, emphases added). According to the district court, because of the above, and because Dr. Hooper was not replaced by anyone, a reasonable jury could not find "that Defendants' actions were motivated by Plaintiff's age" (A.41). Additionally, though respondents offered no evidence they would have acted the same irrespective of Dr. Hooper's age, the court concluded that "even assuming that Plaintiff's evidence established that age was a motivating factor in Dr. Hooper's termination, Defendants have proven the same decision would have been reached if age had not been a

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court called the claim "relatively minor." *See*, A.57

factor" (A.41).[15]

The district court also ruled Retaliation not established (A.41-43). It found no evidence of deviation from policy by not allowing Dr. Hooper access to his Panels despite testimony (A.142) that other doctors who left MMG were permitted to notify their patients and "no causal connection between the filing of the EEOC claim and denial of access to patient information" (A.42). It also concluded that other retaliation allegations had no basis, contrary to Dr. Hooper's affidavit (A.42-43).

As to the April, 1991 leave of absence agreement, the district court held there was no contract (A.44). It did not even address the testimony of Dr. Withrow:

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[15] Respondents' stated reasons for the discharge were:

> . . . the basis for the decision to terminate Dr.Hooper was a consideration of what was in the best interests of the corporation. [Record references omitted.] More particularly, the Individual Defendants believed that Dr. Hooper's conduct was detrimental to MMG; that he was abusive to employees, disrespectful of his colleagues, disdainful of policies and procedures, and generally behaved in a manner which was both hostile and destructive. [Record references omitted.] In addition, several of the Individual Defendants believed Dr. Hooper was self-dealing and negotiating certain financial arrangements for himself with others which were contrary to his obligations to MMG as his employer. [Record references omitted.] Finally, the Board of Directors based their decision to terminate him in part on his unilateral and unauthorized "leave of absence," which was, in their opinion, directly contrary to his obligations to MMG and to the Individual Defendants.

> All of the partners were aware and given copies of this note. Dr. Hooper took a unilateral action and chose to take a leave of absence which all of us chose to accept.

Nor did it mention MMG's memoranda stating Dr. Hooper was on a leave of absence. Moreover, it concluded that the claimed terms of the agreement and Dr. Hooper's employment contract were "contradictory" and therefore that the April 18 memorandum was neither a contract nor a modification of Dr. Hooper's employment agreement (A.44), and held it "unnecessary to determine whether or not there was a promise to bargain in good faith" for the purchase of Dr. Hooper's stock because "there was [not] an agreement to buy out Dr. Hooper's MMG stock" (A.45).

The district court also rejected the breach of contract and fraud claims based on promises of five of the six "partners" to retain Dr. Hooper as President until the IRS loan was paid. It stated, despite Dr. Hooper's testimony of such an agreement and respondents' admissions that they wished Dr. Hooper to remain President primarily to obtain the loan, that there was "'no 'hard' evidence supporting Hooper's claim that there was an oral agreement." Furthermore, the court concluded that by stating he would "go along" with Withrow's election after it was a *fait accompli*, "Dr. Hooper waived any rights he may have had" (A.46-47).

With respect to the fraud claim, the court, notwithstanding that Dr. Hooper was ousted as President at the very first opportunity after the loan was obtained, found no evidence of intent not to keep the promise. It also discredited expert testimony and found no evidence of damages (A.45, 128).

There is clear law from jurisdictions other than Maryland imposing fiduciary duties between and among shareholders in a closely held corporation (*see*, A.129-130). Both respondents and the district court agreed there is no

contrary Maryland law. That notwithstanding, the court held such duties inapplicable in Maryland (A.50-51).

Following summary judgment, defendants moved for FRCP Rule 11 sanctions against "Plaintiff and/or his attorney."[16] Defendants claimed their clients' fees and expenses exceeded $176,000.[17] On November 29, 1993,[18] after receipt of our ordered response (A.145-157), the district court assessed sanctions of $5,000 against plaintiff 's counsel, payable to defendants, for signing the Second Amended Complaint and the summary judgment opposition (A.69). It found not even arguable merit to any of the first seven Counts of the Complaint. Furthermore, the court stated that it "could not conclude that the positions taken were 'not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation'" (A.63), and that "it is [the district court's] abiding conviction that this case was pursued by the Plaintiff, with the knowing assistance of his counsel, with the purpose of costing the Defendants as much as possible to defend against it" (A.63). The district court cited nothing to support this statement.[19] Moreover, the district court appeared to attempt to interfere with the relationship between Dr. Hooper and his counsel and/or to create conflict between them (A.64-65, emphases added):

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[16] Respondents' motion did not specify which pleadings they claimed were signed in violation of Rule 11.

[17] Respondents engaged two law firms which billed 1,276 hours through the summary judgment hearing for services of six attorneys and at least four paralegals. Four attorneys attended each discovery motions hearing and the summary judgment hearing, and two (at times three) defense counsel were at every deposition. They contended this legal battery and expenditure was required to deal with Dr. Hooper's claims, advocated by a single attorney whose competence they had questioned (*see*, A.145 n.1), and who billed approximately 500 hours.

[18] All dates hereafter are 1993, unless otherwise stated.

[19] As stated, *infra*, respondents were unable to cite anything to support the district court's "abiding conviction" in their brief in the court of appeals, at oral argument, or in response to our petition for rehearing.

> The Defendants have sought sanctions against Plaintiff and his attorney. * * * It is readily apparent Plaintiff 's counsel, by signing the aforementioned documents [Second Amended Complaint and Opposition to Summary Judgment], is subject to Rule 11 sanctions. Thus, sanctions will be imposed on counsel. *The extent to which Plaintiff 's counsel believes that the Plaintiff himself should bear, or share in, those sanctions is a matter for them to resolve among themselves.*

It also said that even were its judgment reversed in part, it still would impose sanctions of $5,000 (A.65-66):

> Here, even if an appellate Court were to disagree as to the imposition of sanctions regarding Count VI[3] or some other Count,[4] the bottom-line result would be the same. Plaintiff 's counsel has pursued at least several Counts in violation of Rule 11. Accordingly, the sanction amount -- being in this Court's judgment the least adequate to carry out the purpose of Rule 11-- is being set at the same level as would be imposed if Count VI (or even one or two other Counts) were not subject to sanctions.

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[3]Because of the novelty of the legal position taken.

[4]On a basis this Court cannot foresee.

While the sanctions motion was pending, Dr. Hooper moved for partial vacation of the summary judgment order (A.159-163). Not conceding the validity of any summary judgment ruling, and relying on 28 U.S.C. 1367 and FRCP Rule 54(b), he sought vacation of summary judgment on the

state law claim based on breach of fiduciary duties in a closely held corporation on the ground that the court may have ruled improvidently on an unsettled issue of Maryland law once it decided to dismiss the related federal claims.[20] We argued vacation was appropriate since final judgment was not entered and there was a Maryland case pending between the same parties on a different matter (see, A.53-53), and in which such issue could be decided.

In their opposition, and without making a separate motion, respondents suggested sanctions additional to those already sought be imposed on Dr. Hooper's counsel for filing the motion for partial vacation. At about the same time, counsel for the individual respondents wrote to the judge asking entry of judgment (A.165-166). Plaintiff 's counsel responded by letter (A.167). The court treated the letters as a motion for entry of judgment and a response, granted the same, denied the motion for partial vacation, ordered plaintiff 's counsel to respond to respondents' "motion" for further sanctions by November 30, that respondents submit by that date a statement of their costs for opposing the motion, and permitted both plaintiff 's and respondents' counsel to respond to the ordered simultaneous submissions by December 14 (A.55-57). The court also entered judgment (corrected two days later (A.59)) on Counts I through VII, and with respect to Count VIII as moot.[21]

On November 29, plaintiff 's counsel responded as ordered by the court (A.175-187), pointing out, *inter alia*, disparate treatment of counsel by the court[22], a denial of

[20] We did not contend the ERISA claim provided a basis for federal jurisdiction on state law claims. Federal jurisdiction on such claims was based solely on the Age and Retaliation Counts. The district court agreed with our assessment. See, A.53.

[21] The Corrected Judgment changed an erroneous reference to "*Defendant* James L. Hooper, M.D." (emphasis added). As stated, n.14, *supra*, the ERISA claim was mooted.

[22] The district court took no action against respondents with respect to a groundless motion to disqualify Dr. Hooper's counsel (*see*, A.11-18), no action as a result of a subpoena issued to Dr. Hooper's

Procedural Due Process,[23] potentially chilling appellate rights, and the unsubstantiated basis of the court's statements regarding plaintiff 's and his counsel's intents to cost respondents as much as possible, including, but not limited to, the fact that respondents ignored pre-litigation offers to settle for $150,000, and later $125,000, and instead chose to spend more than $176,000 to litigate. *See*, A.182, 189-190.

Respondents simply ignored the ordered (A.57-58) November 30 filing date. Instead, on November 30, they served a Bill of Costs, which states, in pertinent part, "A supplement to Defendants' Motion for Attorney's Fees and Sanctions Pursuant to Rule 11 of the Federal Rules of Civil Procedure will follow, by separate pleading, including attorneys' fees incurred by Defendants since the date of Defendants' submission of the Motion for Sanctions." Such submission was made December 14, as a purported "Reply" to our Opposition to Defendants' Motion for Further Sanctions (A.175-187). On December 13, plaintiff 's counsel served a Statement of Position (A.191-193) stating that respondents had not made the ordered November 30 filing and asking its preclusion. On the same date, he wrote to the court requesting that any untimely filing not be considered, or, alternatively, that he be given an opportunity to respond, as contemplated by the court's November 15 Order (A.195-196). Dr. Hooper also appealed from the Judgment. The following day, the district court assessed $500 in additional sanctions

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counsel (*see*, A.25-26), which at least bordered on contempt of the district court's order denying disqualification, and no action with regard to separate oppositions (contrary to their practice of joint filings) to Dr. Hooper's motion for a four day extension of time to file his opposition to the summary judgment motion (*see*, A.135). Thereafter, the district court failed to act when respondents did not make a filing ordered by the court. *See*, *infra*, and A.191-195, 55-58.

[23] The court ruled on the motion for partial vacation without awaiting a Reply (A.55-58) specifically allowed by Local Rule 105 -- a Reply filed six days before it was due. Upon reading our objection to the procedure (A.179), the court treated the Reply as a motion for reconsideration, which it denied (A.72-73).

against, payable to Defendants, counsel for having moved for partial vacation of the summary judgment (A.74-77). Sanctions were not imposed because of "the lack of merit of Plaintiff 's substantive position" or because of "any general inability to file post decisional motions." Sanctions were imposed for what the court called "the gross impropriety of Plaintiff 's counsel in filing Plaintiff 's Motion for Partial Vacation of Order of June 30, 1993 in the context of this case." A.74.

By unpublished *per curiam* opinion, the court of appeals affirmed. It held summary judgment proper for the reasons given by the district court. With respect to the Age Discrimination claim, it referred to the lower court's conclusion that "MMG had articulated a legitimate nondiscriminatory explanation for the discharge and that isolated comments such as the *one* by Dolinsky were insufficient to create a genuine issue of material fact" (A.8, emphasis added, citing *Gagne* v. *Northwestern Nat. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989). Turning to the sanctions, the court of appeals stated,[24] "The district court imposed a $5,000 sanction . . . for filing the second amended complaint because Hooper's claims had no merit and because the case had been pursued 'with a purpose of costing the Defendants as much as possible to defend against it'" (A.9-10). It concluded the district court did not abuse its discretion with respect to either sanction (A.10).[25]

A timely filed petition filed for rehearing directed to Age Discrimination and sanctions was denied by a 2 to 1 vote (A.80-81).

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[24] The court of appeals inaccurately stated the $5,000 sanction was assessed for signing the Second Amended Complaint (A.9). Five Thousand Dollars was imposed for signing the Complaint *and* the Opposition to the Motion for Summary Judgment. *See*, A.69.

[25] MMG moved for further sanctions pursuant to FRAP Rule 38 arguing the appeal was frivolous. The motion was denied. A.9 n.2.

REASONS FOR GRANTING THE WRIT

I. Age Discrimination

In *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), this Court stated (490 U.S. at 251, plurality opinion, emphasis in original):[26]

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.

In concurring, Justice O'Connor wrote that "stray remarks in the workplace, while perhaps probative of sexual harassment [citation omitted], cannot justify requiring the employer to prove its hiring or promotion practices were based on legitimate criteria" and that "statements by decisionmakers *unrelated* to the decisional process itself, [cannot] suffice to satisfy the plaintiff 's burden "in proving discriminatory motive." 490 U.S. at 277 (emphasis added). *Compare*, the dissent of Justice Kennedy indicating that even "'stray remarks'" may be "evidence of discriminatory animus" (490 U.S. at 291).

Leaving aside whether Dolinsky's remarks are direct, indirect, or circumstantial evidence of discriminatory animus (*see*, *Brown* v. *East Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993), *rehearing en banc denied*, 995 F.2d

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[26] *Price Waterhouse* deals with sex discrimination. It also applies to other forms of employment discrimination. Age Discrimination is analyzed in the same manner as other types of discrimination. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985); *Robinson* v. *Overseas Military Sales Corp.*, 21 F.3d 502, 507-508 (2d Cir. 1994).

225 (1993); *Alphin* v. *Sears, Roebuck & Co.*, 940 F.2d 1497, 1500-1501 (11th Cir. 1991); *Normand* v. *Research Institute of America, Inc.*, 927 F.2d 857, 864 (5th Cir. 1991)), the comments were probative of the age issue. When remarks in the workplace are evidence of discrimination is critical in employment discrimination litigation. And, when such remarks are direct evidence of discrimination is crucial to deciding when the *Price Waterhouse* formula applies, or when the proof matrix of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and its progeny is appropriate.[27] Justice Kennedy wrote in his dissent in *Price Waterhouse* (490 U.S. at 291, emphases added):

> Although the *Price Waterhouse* system is not for every case, almost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of "stray remarks" or other evidence of discriminatory animus. * * *

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[27] There is confusion in and within the circuits as to when such comments are relevant as well as when they are direct evidence of discriminatory animus. *See, e.g., La Pointe* v. *U.A.W.*, 8 F.3d 376, 379-380 (6th Cir. 1993); *Burns* v. *Gadsden State College*, 908 F.2d 1512, 1518-1519 (11th Cir. 1990); *Hong* v. *Children's Memorial Hospital*, 993 F.2d 1257, 1265-1266 (7th Cir. 1993), *certiorari denied*, __ U.S. __, 114 S.Ct. 1372 (1994), *rehearing denied*, __ U.S. __ , 114 S.Ct. 2695 (1994); *Troupe* v. *May Department Stores*, 20 F.3d 734, 736-737 (7th Cir. 1994); *Colsi* v. *Electri-Flex Co.*, 965 F.2d 500, 502 (7th Cir. 1992); *Brown* v. *Sites Concrete, Inc.*, 994 F.2d 553, 564 (10th Cir. 1993); *Stacks* v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1324 (8th Cir. 1994); *Fields* v. *Clark University*, 817 F.2d 931, 933-935 (1st Cir. 1987); *McCarthy* v. *Kemper Life Ins. Companies*, 924 F.2d 683, 686-687 (7th Cir. 1991); *Robinson* v. *Overseas Military Sales Corp., supra*, 21 F.3d at 508; *Guthrie* v. *Tifco Industries*, 941 F.2d 374, 378-379 (5th Cir. 1991), *certiorari denied*, __U.S.__, 112 S.Ct. 1267 (1992); *Alphin* v. *Sears Roebuck & Co., supra*, 940 F.2d at 1500-1501; *Turner* v. *North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992); *Brown* v. *East Mississippi Elec. Power Ass'n, supra*, 989 F.2d at 861; *Normand* v. *Research Institute of America, Inc., supra*, 927 F.2d at 864 n.3, and cases therein cited, including *Gagne* v. Northwestern *Nat. Ins. Co., supra*.

> *Courts will . . . be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence.*

Though it may be impossible to articulate absolute standards, the existing confusion regarding "animus" evidence can be minimized. It is possible to eliminate what are, albeit unintended, apparently arbitrary and capricious determinations of the sufficiency of such evidence, and, indeed, when it even is admissible.[28]

Here, a primary decision maker, Dolinsky[29], just after the meeting at which Dr. Hooper was ousted as MMG President, received a telephone call and made statements of age animus directed at Dr. Hooper which he then told his secretary to forget she heard. Thereafter, Dolinsky asked Dr. Hooper what it would take to get him to leave since he was "getting close to retirement age." He also stated in his deposition that he considered offering Dr. Hooper an "emeritus" position. While Dr. Hooper's formal discharge was nearly a year later, immediately after ousting Dr. Hooper from the Presidency other corporate principals began a campaign of harassment intended to force Dr. Hooper's resignation. Notwithstanding the undenied harassment, the district court and the court of appeals held Dolinsky's telephone comments "isolated" and "remote" and "too prejudicial" to be evidence of discriminatory animus.[30] Both courts relied on *Gagne* v. *Northwestern Nat. Ins. Co.*, *supra*, which involved facts readily distinguishable from this case, *i.e.*, remarks clearly

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[28] We note that the court of appeals held a district court may exercise discretion to sanction counsel who relies on such evidence. *See*, *infra*, Point II.

[29] Dolinsky nominated Withrow for President.

[30] The court of appeals did not discuss Dolinsky's "getting close to retirement age" and "emeritus" statements. It simply found Dolinsky's telephone comments "isolated" and "insufficient to create an issue of fact" (A.8).

isolated, ambiguous, and not directly related to the employment decision.

The holdings of the courts below are contrary to decisions in other circuits that such remarks, at a minimum, are circumstantial evidence of discriminatory animus. *See, e.g., Alphin* v. *Sears Roebuck & Co., supra*, 940 F.2d at 1500-1501; *Stacks* v. *Southwestern Bell Yellow Pages, Inc., supra*, 27 F.3d at 1324; *Normand* v. *Research Institute of America, Inc., supra*, 927 F.2d at 864; *Hybert* v. *Hearst Corp.*, 900 F.2d 1050, 1053 (7th Cir. 1990).

Moreover, Dolinsky's statements were not the sole evidence of discrimination. There was evidence of disparate treatment unmentioned both by the district court and the court of appeals. The Complaint alleged that other younger partners had malpractice and professional misconduct problems and were retained.[31] By contrast, Dr. Hooper was discharged. One "young and unmarried" physician, who admittedly engaged in professionally improper conduct in the mid-1980's, (the same period as Dr. Hooper's alleged financial improprieties) had no action taken against him. Such conduct plainly was damaging to the corporation. It resulted in legal claims, and, obviously, any publication of the conduct to outsiders would, to put it mildly, not have been beneficial to MMG. Respondents relied on alleged and unproven conduct by Dr. Hooper in that same time frame as a reason for his discharge, claiming he was damaging the corporation.

The courts below also confused a defendant's obligation in an employment discrimination case to articulate nondiscriminatory reasons for an adverse employment action with meeting a burden of proof. *See, Price Waterhouse, supra*; *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); and *St. Mary's Honor Center* v. *Hicks*, __

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[31] As stated, *supra*, we were precluded from pursuing discovery in this area because the magistrate judge deemed the matter irrelevant. The district judge did not act on our timely filed objections; thus apparently affirming the ruling *sub silentio*. The court of appeals found the discovery rulings correct (A.10).

U.S. __ , 113 S.Ct. 2742 (1993), which state that the defendant must introduce evidence which, "*if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *Hicks*, *supra*, 113 S.Ct. at 2447 (emphases in original). A plaintiff "'may succeed . . . either directly by persuading the court that a reason more likely motivated the employer or indirectly by showing the employer's proffered reason is unworthy of credence'" (*Id.* at 2752, quoting *Burdine*). In a mixed motives situation, the employer must prove affirmatively it would have taken the same action *sans* the proscribed motive. *Price Waterhouse*, *supra*, 490 U.S. at 242, 258 (plurality opinion); *and see*, concurring opinions of Justices White and O'Connor (490 U.S. at 258-270); dissenting opinion of Justice Kennedy (490 U.S. at 280).

Here, there was evidence of discriminatory animus, as well as disparate treatment. Plaintiff made a *prima facie* case. Respondents claim they adduced evidence of nondiscriminatory reasons for the discharge. Assuming, *arguendo*, they met the burden of production, the matter does not end there. Dr. Hooper raised a triable issue of fact by showing those reasons not credible and thus presumably pretextual.

Respondents' reasons simply do not withstand scrutiny. They stated that part of the reason for the discharge was unproven improper financial dealings that allegedly occurred at least five years before and that Dr. Hooper took an unauthorized leave of absence. As stated above, the record shows the leave of absence not only authorized, but agreed to by MMG President Withrow and accepted by the MMG Board which circulated confirming memoranda, and that Dr. Hooper was elected President repeatedly after the claimed transgressions. The allegedly "hostile and disruptive" behavior was triggered by respondents' conduct which was designed and intended to "get [Dr. Hooper's] old ass out completely."

Whether the above reasons were the real causes of Dr. Hooper's termination, or whether a substantial reason was age, could not properly be resolved on summary judgment.[32] It was for the *trier of fact* (the jury) to make those determinations. *Hicks, supra*, 113 S.Ct. at 2753-2754.

An employer does not satisfy his *burden of proof* simply by stating nondiscriminatory reasons. Articulation of non-discriminatory reasons, once a *prima facie* case is made, simply satisfies the *burden of production*. As discussed above, respondents' reasons were questionable on their face, and Dr. Hooper presented sufficient argument, supported by evidence of record, that further placed credibility of the articulated nondiscriminatory justifications at issue.[33]

Even if on a different record Dolinsky's telephone conversation arguably might not be viewed as direct evidence of age animus with respect to the final act of discharge, it is direct evidence of animus with respect to the campaign of

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[32] Principles applicable to ruling on a summary judgment motion are well settled. The evidence is to be viewed in the light most favorable to the non-moving party, and, for purposes of the motion, credibility resolutions and all permissible inferences are to be made in favor of the non-movant. The trial judge may not try the case on papers. *See, e.g., Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-252 (1986); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970).

[33] The court of appeals states (A. 7) that on the same day as Dr. Hooper gave the leave of absence memorandum he "signed an employment contract with a competing health care provider in violation of his employment agreement with MMG." That is flatly wrong and unsupported by the record. While on leave, he went to work part time at the U.S. Census Bureau Health Unit some 40 miles away from MMG. His MMG employment contract did not prohibit other employment. Its only prohibition was employment "which would interfere with the satisfactory performance of . . . duties as an employee of [MMG]." Obviously, working elsewhere for one not in competition while on leave was not a breach the employment contract. In any event, respondents did not rely on the other employment as a reason for the discharge. There is no evidence they even knew of it. After acquired evidence cannot be used to justify a discriminatory discharge. *McKennon* v. *Nashville Banner Pub. Co.*, __U.S.__, 115 S.Ct. 879 (January 23, 1995).

harassment that began immediately thereafter with the intent to force Dr. Hooper from his employment. The record leaves little doubt respondents intended, at the least, a constructive discharge.

This was not a case of general or "stray" remarks unrelated to the employment action. Dolinsky's telephonic comments were specifically about Dr. Hooper and related to the decisional process.[34] Discriminatory conduct followed immediately. Moreover, the direct statement of animus was corroborated by Dolinsky's later remark to Dr. Hooper that he was "getting close to retirement age" followed by asking what it would take to get him to leave, and his deposition testimony that he thought of offering Dr. Hooper "emeritus" status.

If the record is read to permit a mixed motives finding, the burden shifted to respondents to prove they would have acted the same absent proscribed motivation. *Price Waterhouse*, *supra*. Respondents did not carry that burden. They were not entitled to summary judgment.[35]

II. SANCTIONS

A.

The district court imposed $5,000 in FRCP Rule 11 sanctions against Dr. Hooper's counsel for signing the Second Amended Complaint and the Opposition to Defendants' Motion for Summary Judgment (A.69). A substantial reason the district court gave for its imposition of sanctions was its perception that the case had been pursued unreasonably and vexatiously to "[cost] defendants as much as possible to defend against it" (A.63). Neither the district court, the court

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[34] In the courts below, respondents sought to diminish the significance of the comments by arguing that Rankin did not know to whom Dolinsky was speaking. To whom he was speaking is immaterial.

[35] The district court obviously engaged improperly in the weighing of evidence and choosing between conflicting inferences when it found statements "*more likely*" (emphasis added) showed nondiscriminatory motivations (A.40).

of appeals, nor respondents have cited any evidence to support this perception which the district court termed its "abiding conviction" (A.63).

Though intimating it might not have imposed sanctions were it considering the matter *de novo* (A.10),[36] the court of appeals held it could not reverse the district court's assessments of Rule 11 sanctions based on an abuse of discretion standard of review (A.10). The court of appeals misunderstood or misapplied the abuse of discretion standard of review to Rule 11 sanctions.

In *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), this Court held all aspects of Rule 11 sanctions reviewable only for abuse of discretion. However, the Court went on to state, "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence" (*Id.* at 405)

The court of appeals reviewed a summary judgment. Sanctions were imposed, *inter alia*, for signing an opposition to the summary judgment motion.[37] Review of summary judgment is *de novo*. That notwithstanding, the court of appeals believed itself constrained to review the finding of the court below that the opposition (A.101-134) -- 28 pages replete with citations to a more than 200 page appendix from the record and supported by ample and relevant case authority-- under an abuse of discretion standard that precluded it from determining as a matter of law whether the opposition was frivolous. The court of appeals believed that whether a summary judgment opposition presents good faith

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[36] The court denied a motion for FRAP Rule 38 sanctions sought on the ground the appeal was frivolous (A.9 n.2). The appeal advanced substantially the same arguments on the merits as were made opposing summary judgment.

[37] As stated, *supra*, n.24, the court of appeals inaccurately stated the sanction was imposed for signing the Second Amended Complaint. It made no mention of the summary judgment opposition. A.9.

argument is not determined by any legal standard.[38] Since summary judgment is subject to *de novo* review, it is illogical that the determination whether an opposition to a summary judgment motion is frivolous is subject to review that precludes consideration of the filing's legal sufficiency. The approach of the court of appeals gives the district courts absolute discretion to sanction losing counsel whenever summary judgment is granted, and, conversely, absolute discretion to sanction losing counsel whenever a motion for summary judgment is denied. *See also*, A.64-65.

Rule 11 was not intended to force trial counsel to concede summary judgment where there is even a " 'glimmer of chance of prevailing.' " *Hoover Universal Inc.* v. *Brockway Imco, Inc.*, 809 F.2d 1039, 1044 (4th Cir. 1987). The standard here imposed creates a "Catch-22" and makes the practice of law all but impossible. If counsel does not make every conceivable good faith argument, he or she is guilty of not vigorously representing a client, and is subject to malpractice claims where other expert witness attorneys will testify he or she should have opposed the motion and probably would have prevailed. Nor was Rule 11 intended to make counsel "gun shy" in seeking summary judgment where that seems appropriate and can be supported by non-frivolous argument.[39]

An appellate court is in as good a position to review and evaluate the legal sufficiency of the filings as is a district

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[38] The court of appeals opinion does not expressly so state; however, this point was raised in our petition for rehearing which was denied by a 2 to 1 vote (A.80-81).

[39] Equally, if not more important, is the professional damage caused by the imposition of Rule 11 sanctions. The Chief Deputy Clerk of this Court has informed us that admission to practice automatically is denied, based on instruction from the Court, pursuant to Rule 5.1., for Rule 11 sanctions imposed within 3 years prior to application, and that there are many denials for that reason. Rule 11 sanctions thus are of serious professional consequence, not simply a pecuniary matter.

court.[40] Such review simply does not involve the "'fact intensive close calls'" that concerned the Court in *Cooter & Gell*, (496 U.S. at 404), or "factual determinations [the district court] was 'better positioned' to make" (*Id.* at 403). That is particularly so where the sanction was, as here, based only on the document itself, not in any part on the sufficiency of the pre-filing inquiry and surrounding circumstances.

The court of appeals also assumed the correctness of the district judge's "abiding conviction" that the case was pursued by "Plaintiff, with the knowing assistance of his counsel, with the purpose of costing the Defendants as much as possible to defend against it" (A.63). The district judge did not cite, mention, or refer to any supporting evidence. Notwithstanding respondents' inability to provide any evidentiary support in their brief, at oral argument, or in response to our petition for rehearing, the court of appeals affirmed the sanctions based, at least in substantial part, on the district judge's unsupported "abiding conviction." It was error for the district court not to explain in detail the factual basis for its conviction so there could be meaningful appellate review. *See*, *F.D.I.C.* v. *Calhoun*, 34 F.3d 1291, 1296-1297 (5th Cir. 1994).

Not only is there no record support for the statements of the district court. The record compels a conclusion just the opposite from that reached by the district judge. Dr. Hooper sought to settle this case on very reasonable terms, before any litigation, in a letter written for him without charge by his trial counsel (*see*, A.182, 189-190). Rather than discuss settlement, respondents spent $176,000 on litigation just through the summary judgment motion. Moreover, the $5,000 sanction was imposed for signing the Second Amended Complaint and the summary judgment opposition. Thus, the perceived vexatious and sanctionable conduct of the litigation must have occurred following that point. The

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[40] Because the appellate court is in the same position as a district court, review of a summary judgment is *de novo*.

Second Amended Complaint was filed with the understanding plaintiff would not have further discovery (A.29-30).[41] Rule 11 makes sanctionable pleadings or papers *signed* in violation of the Rule. Accordingly, sanctions properly can be imposed only from the point of signature forward. There is no record support for a conclusion trial counsel did anything untoward, improper, or vexatious following the filing of the Second Amended Complaint. Indeed, there is no record support for such conclusion as to his conduct of the litigation prior to the filing. *See also*, p.12, *supra*.

The district judge had minimal involvement in this case, having referred all pre-summary judgment matters to a magistrate judge (*see*, A.19). His only involvement was two telephone conferences, the summary judgment hearing and subsequent matters relating to mooting of the ERISA claim, the sanctions and fees motions, and related matters. The summary judgment hearing was the *only* hearing he held in this case. Thus, the district court was not "[f]amiliar with the issues and the litigants" as contemplated by *Cooter & Gell* (496 U.S. at 402).[42]

Had the trial court made a finding of fact regarding the conduct and motivation of Dr. Hooper's counsel, it would have been "clearly erroneous." *Cooter & Gell* teaches that "the abuse-of-discretion and clearly erroneous standards are indistinguishable" (496 U.S. at 401) and that when a district court bases its sanctions rulings "on a clearly erroneous assessment of the evidence" it abuses its discretion (*Id.* at 405). The court of appeals had an obligation to determine whether there was evidence to support the "abiding

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[41] Plaintiff did seek and was granted leave to serve limited interrogatories relating to new defenses raised in the Answers to the Second Amended Complaint with respect to Counts IV through VII, and minimal discovery on the ERISA count on which he prevailed by virtue of MMG's concession.

[42] The record demonstrates the district judge lacked familiarity with prior proceedings. He was unaware an order permitting the Second Amended Complaint was part of the file. See, A.53, 29.

conviction" of the district judge. It did not do so. *See*, *Calhoun*, *supra*, 34 F.3d at 1296-1297. The court of appeals expressly states that it examined the reasons given by the district court (A.10). It does not state it considered the record, or that the record contains any support for the conclusion of the district court as to the motivation or conduct of counsel.

B.

As stated, *supra*, Dr. Hooper claimed breach of fiduciary duties in a closely held corporation. Maryland precedent has not rejected the cause of action, which is recognized in other jurisdictions. *See*, A.129-130. The cause of action, which the district court rejected, was based substantially on the same facts as relied upon in support of the first seven Counts of the Complaint.[43]

FRCP Rule 54(b) provides that rulings are subject to revision until entry of final judgment. The motion for partial vacation was authorized and proper. 29 U.S.C. 1367(c) states the circumstances under which a district court may decline to exercise supplemental jurisdiction. One such instance is a novel or complex issue of state law. That was the situation here. It was perfectly proper to suggest to the court that it may have ruled improvidently once it decided to dismiss the related federal claims.[44]

Sanctions were not imposed for reasons authorized by Rule 11. The filing was not made for any improper purpose and was not frivolous. *See*, *Glanz* v. *Vernick*, 756 F.Supp.

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[43] Respondents did not object to the filing of this Count on grounds it failed to state a claim. In fact their counsel acknowledged at the hearing on the motion for leave to amend that he had advocated similar claims in other jurisdictions and stated there was no definitive Maryland precedent.

[44] It is difficult to understand how a motion the court had discretion to grant could be sanctionable. Moreover, the court could simply have denied the motion without awaiting a response. It had the motion pending 17 days before respondents filed their opposition.

632, 639 (D. Mass. 1991); *Anspec Co., Inc.* v. *Johnson Controls, Inc.*, 788 F.Supp. 951, 959-960 (E.D. Mich. 1992); *Freer* v. *Meyer*, 796 F.Supp. 89, 94 (S.D. N.Y. 1992). That notwithstanding, the court of appeals held the district court had discretion to impose sanctions.

Furthermore, again the district court imposed sanctions based on its perception that counsel was seeking needlessly to increase the cost of litigation. *See*, A.56.[45] For reasons stated in Point A, *supra*, this was an abuse of discretion because there was no evidence to support such a conclusion. *See also*, nn.17, 22, and p.25, *supra.*

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,
William A. Beeton, Jr.
Counsel of Record for Petitioners
Allen H. Sachsel
Of Counsel for Petitioners
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400

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[45] As stated, *supra*, plaintiff based the cause of action on matters with respect to which discovery had been concluded. Discovery in this case could have been used in the state proceeding. *See*, *Freer* v. *Mayer*, *supra*, 796 F.Supp. at 94, and A.183.